Supreme Court, U.S.
FILED
JAN 7 1992
OFFICE OF THE CLERK

91-1116

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH HICKS,
Petitioner,

vs.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOHN D. LYNN
MICHAEL J. HOARE
MICHAEL J. HOARE, P.C.
314 North Broadway, Suite 1130
St. Louis, Missouri 63102
(314) 241-7961

Attorneys for Petitioner Hicks

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

QUESTION PRESENTED FOR REVIEW

Whether the Civil Rights Act of 1991, in particular Section 101 of the Act, applies retroactively to cases pending in court on the date of its enactment so that judgment must be entered in favor of plaintiff Hicks in this case?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdictional Statement	2
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Petition for Certiorari	7
Conclusion	10
Appendix	
A. Order of the United States Court of Appeals for the Eighth Circuit (October 9, 1991)	A-1
B. Order of the United States Court of Appeals for the Eighth Circuit (December 23, 1991)	A-3

TABLE OF AUTHORITIES

Page(s)

Cases:

Alexandre v. AMP, Inc., 57 FEP Cases 768 (W.D. Pa., Dec. 5, 1991) 8

Barr v. Matteo, 355 U.S. 171 (1957) 9

Bowman v. Loperena, 311 U.S. 262 (1940) 6

Bradley v. Richmond School Board, 416 U.S. 696 (1974) 9

Brown Group, Inc. v. Hicks, 111 S. Ct. 1299 (1991) 3

Bureau of Economic Analysis v. Long, 454 U.S. 934 (1981) 9

Clarke v. United States, 898 F.2d 162 (D.C. Cir. 1990) 6

Hansel v. Public Service Company of Colorado, 1991 U.S. Dist. Lexis 17904 (D. Colo., Dec. 11, 1991) 8

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990) 3,4

James v. American International Recovery, Inc., C.A. No. 1:89-CV-321-RHH (N.D. Ga., Dec. 3, 1991) 8

King v. Shelby Medical Center, C.A. No. 91-AR-2258-S (N.D. Ala., Dec. 18, 1991) 8

LaCour v. Harris County, 57 FEP Cases 622 (S.D. Tex., Dec. 6, 1991) 8

Laing v. United States, 423 U.S. 161 (1976) 8

Massey v. United States, 291 U.S. 608 (1934) 6

Mojica v. Gannett Co., 57 FEP Cases 537 (N.D. Ill., Nov. 27, 1991) 8

Patterson v. McClean Credit Union, 109 S. Ct. 2363 (1989) 3,4

Sioux Tribe v. United States, 329 U.S. 684 (1946) 9

Stender v. Lucky Stores, C.A. No. C-88-1467 (N.D. Calif., Dec. 19, 1991) 8

Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990) 3

Van Meter v. Barr, 57 FEP Cases 769 (D.D.C., Dec. 18, 1991) 8

Statutes:

42 U.S.C. § 1981 ..... *passim*

Civil Rights Act of 1991 ..... *passim*

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH HICKS,
Petitioner,

VS.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Order of the Eighth Circuit Court of Appeals dated October 9, 1991 which reversed the judgment of the district court in favor of plaintiff Hicks and remanded the case to the district court with directions to dismiss his complaint with prejudice is reported at 946 F.2d 1344 (8th Cir. 1991) and is printed in the Appendix. The Order of the Eighth Circuit Court of Appeals dated December 23, 1991 which denied plaintiff Hick's motion to vacate the Court's Order dated October 9, 1991 is not reported and is printed in the Appendix.

JURISDICTIONAL STATEMENT

The Order of the Eighth Circuit Court of Appeals reversing the judgment of the district court in favor of plaintiff Hicks and remanding the case to the district court with directions to dismiss his complaint with prejudice was entered on October 9, 1991.

The Order of the Eighth Circuit Court of Appeals denying plaintiff Hick's motion to vacate the Court's Order dated October 9, 1991 was entered on December 23, 1991.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTE INVOLVED

Section 101(2)(b) of the Civil Rights Act of 1991 amends 42 U.S.C. § 1981 to include the following language:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

The history of this case, though complex, can be briefly summarized. In 1982, plaintiff Kenneth Hicks, petitioner herein, was terminated from his job by defendant Brown Group, respondent herein. After he was fired, plaintiff Hicks brought suit under 42 U.S.C. § 1981 alleging that his termination was due in relevant part to his race. In 1988, a jury agreed with him, though it declined to award him any actual damages. Instead, it awarded him $10,000 in punitive damages on the ground that Brown Group's discrimination was willful. The district court modified the actual damages to $1.00, left the award of punitive damages undisturbed, and entered judgment in favor of plaintiff Hicks.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed. *See Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990). It ruled, among other things, that claims of racially motivated discharge from employment were still actionable under Section 1981 even after this Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989). In *Patterson*, this Court narrowly construed the scope of Section 1981. In particular, this Court said that the right to "make and enforce contracts" covers only "conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 2374. According to the Court, Ms. Patterson's claim of on-the-job racial harassment involved "[n]either a refusal to make a contract with her or the impairment of her ability to enforce her established contract rights. Rather, the conduct which [she] labels as actionable racial harassment is postformation conduct by the employer relating to the terms and conditions of continuing employment . . . This type of conduct . . . is not actionable under § 1981." *Id.* Because Brown Group believed that discriminatory discharge, like racial harassment, was postformation conduct not covered by Section 1981, it sought review of the panel's decision by this Court.

In the meantime, a different panel of the Eighth Circuit Court of Appeals criticized the result in the *Hicks* case. *See Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990). The Eighth Circuit granted rehearing en banc in the *Taggart* case to reexamine the impact of *Patterson* on claims of discriminatory discharge brought under Section 1981. 934 F.2d 1414. This Court responded to this development by vacating the judgment in *Hicks* and remanding the case to the Court of Appeals for further consideration in light of its en banc opinion to be filed in *Taggart*. *See Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

The Eighth Circuit, sitting en banc, handed down its opinion in *Taggart* on June 6, 1991. The Court ruled that under *Patterson*

discriminatory discharge claims are not actionable under Section 1981. 935 F.2d 947, 948 (8th Cir. 1991). As a result, the panel of the Court of Appeals that originally heard the *Hicks* case issued an Order on October 9, 1991 reversing the judgment in favor of plaintiff Hicks and remanding the case to the district court with directions to dismiss his complaint with prejudice.

On or about October 22, 1991 plaintiff Hicks filed a timely motion to stay the mandate pending application to the U.S. Supreme Court for a writ of certiorari. By order dated October 31, 1991, the Court of Appeals granted the motion. It ordered that the mandate in the case be stayed to and including December 30, 1991.

On November 21, 1991, President Bush signed into law the Civil Rights Act of 1991. Section 101 of the Act overturns the *Patterson* decision and expressly provides that claims of racially motivated discharge from employment are actionable under Section 1981:

> **SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.**
>
> Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended— . . .
>
> (2) by adding at the end the following new subsections:
>
> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and *termination* of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

(emphasis added). In plaintiff Hicks' view, the text, structure and purpose of the Civil Rights Act of 1991 manifest a clear legislative intent in favor of retroactive application of its provi-

sions to cases pending in court on the date of its enactment. Accordingly, he filed a motion to vacate the Order of the Court of Appeals dated October 9, 1991 which dismissed his claim under Section 1981. In support of his motion, he filed a detailed memorandum of law setting forth his arguments in favor of retroactive application of the Civil Rights Act to the case at bar. Additionally, he filed a motion to extend the stay of mandate pending final resolution of his motion to vacate. These motions were filed with the Court of Appeals on December 3, 1991. Defendant Brown Group responded to them on or about December 11, 1991. Among other things, Brown Group filed a detailed memorandum of law setting forth its arguments against retroactive application of the Civil Rights Act to the case at bar.

On December 23, 1991, the Eighth Circuit Court of Appeals issued an Order denying plaintiff Hicks' motions. The Court reasoned as follows:

> In his motion to vacate this Court's judgment of October 9, 1991, Hicks argues that this provision of the Act [Section 101] should apply retroactively to his action against Brown Group, Inc. In view of the Supreme Court's previous remand of this matter we believe this question requires the consideration of the court en banc with the subsequent opportunity for Supreme Court review.
>
> Hicks has failed, however, to file a timely petition for rehearing with suggestion for rehearing en banc. Because of this failure, the time period during which he may petition the Supreme Court for a writ of certiorari to review this court's judgment will expire on January 7, 1991. *See* Sup. Ct. R. 13.1; 13.4. The delay which en banc consideration of this matter would entail therefore would foreclose Hicks' access to further review by the Supreme Court.
>
> Under these circumstances, we believe the question of the retrospective effect of the Civil Rights Act of 1991 on this

> case should be presented to the Supreme Court in a petition for writ of certiorari. Accordingly, Appellee Hicks' motions are hereby denied.

See Appendix B. The Court of Appeals was correct in noting that plaintiff Hicks did not file a timely petition for rehearing with suggestion for rehearing en banc in this case. It is important to point out, however, that it was impossible for plaintiff Hicks to file such a petition in this case; the time for doing so expired on October 23, 1991. *See* F.R.A.P. 35 and 40. At that time, the Civil Rights Act of 1991 was not law. In fact, nobody knew at that time whether it would ever become law. Accordingly, plaintiff Hicks was in no position to file a timely petition for rehearing with suggestion for rehearing en banc in this case based on the passage of the Civil Rights Act of 1991. As it turned out, the Act did not become law until November 21, 1991. Plaintiff Hicks responded to this legislative development by promptly filing a motion to vacate the Court of Appeals' Order dated October 9, 1991 which dismissed his Section 1981 claim. This motion to vacate was the legal equivalent of a petition for rehearing. *Clarke v. United States*, 898 F.2d 162, 164 (D.C. Cir. 1990). Technically, however, it was not timely. As a result, its filing did not toll the time for filing a petition for certiorari with this Court. *Bowman v. Loperena*, 311 U.S. 262, 266 (1940). The clock continued to run and the Court of Appeals concluded that the delay involved in giving *en banc* consideration to plaintiff Hicks' retroactivity argument would foreclose his access to further review by this Court. Accordingly, it ruled that the retroactivity issue should be presented to this Court in a petition for a writ of certiorari. *Cf. Massey v. United States*, 291 U.S. 608 (1934).

REASONS FOR GRANTING THE PETITION FOR CERTIORARI

Many of the cases coming to the U.S. Supreme Court on certiorari involve the interpretation and enforcement of laws of Congress. In some, the intrinsic importance of the statutory issue is the major basis for securing review by this Court. In others, there is a conflict of decisions among the lower federal courts concerning the meaning of the statute. Both factors combine in this case to warrant review by this Court.

The Civil Rights Act of 1991 is a landmark statute. It restores and strengthens the federal civil rights laws banning discrimination in employment. The statute is complex and covers a wide variety of topics. The novel question squarely presented in this case — whether the statute applies retroactively to cases pending in court on the date of its enactment — is one of exceptional national importance. Federal trial judges around the country have an immediate need to know whether the statute applies to civil rights cases currently pending in their courts. Certainly this is true of the many cases brought under Section 1981. But it is also true of the many cases brought under other federal antidiscrimination statutes. For example, Section 102 of the Act expressly provides, for the first time, for jury trials and compensatory and punitive damages in cases brought under Title VII of the Civil Rights Act of 1964. There are several thousand Title VII cases pending in the federal courts. Does Section 102 of the Act apply to these cases? Nobody knows for sure. Yet it is important that federal trial judges have a clear answer to this kind of question. It is vitally important that they get the answer right. If they get it wrong, they will have to retry thousands of cases. This would entail an enormous waste of time and resources for litigants and courts alike. The disturbing prospect of a massive number of retrials in cases brought under the civil rights laws calls for the immediate exercise of this Court's power of supervision over the federal judiciary to clarify the meaning and application of the Civil Rights Act of 1991.

The retroactivity issue is not only novel and important but it is also difficult and troublesome. The basic problem stems from the fact that Congress did not explicitly state, in so many words, whether it wanted the Civil Rights Act of 1991 to apply retroactively or prospectively. As a result, the federal district courts are sharply divided over the issue. At least four courts have ruled that the Civil Rights Act of 1991 is retroactive. *See Stender v. Lucky Stores*, C.A. No. C-88-1467 (N.D. Calif., Dec. 19, 1991); *King v. Shelby Medical Center*, C.A. No. 91-AR-2258-S (N.D. Ala., Dec. 18, 1991); *Mojica v. Gannett Co.*, 57 FEP Cases 537 (N.D. Ill., Nov. 27, 1991); *LaCour v. Harris County*, 57 FEP Cases 622 (S.D. Tex., Dec. 6, 1991). At least four other courts have ruled that the Civil Rights Act of 1991 is prospective. *See Van Meter v. Barr*, 57 FEP Cases 769 (D.D.C., Dec. 18, 1991); *Hansel v. Public Service Company of Colorado*, 1991 U.S. Dist. Lexis 17904 (D. Colo., Dec. 11, 1991); *James v. American International Recovery, Inc.*, C.A. No. 1:89-CV-321-RHH (N.D. Ga., Dec. 3, 1991); *Alexandre v. AMP, Inc.*, 57 FEP Cases 768 (W.D. Pa., Dec. 5, 1991). This conflict among the courts surfaced rapidly even before the ink on the Act was dry. As Judge Gesell has remarked, the law is in a "state of total confusion." *Van Meter, supra.* The passage of time will not cure the problem; it will only exacerbate it. There will be widespread litigation, with conflicting results, until the matter is finally settled by this Court. Under these circumstances, this Court cannot afford to postpone consideration of the issue. An early and definitive ruling is needed to dispel the fog of confusion which currently hangs over the federal court system and which threatens to disrupt the orderly and efficient administration of justice in it. *See Laing v. United States*, 423 U.S. 161, 167 (1976).

It is important to note, however, that this Court should grant the petition for certiorari even if it concludes, for whatever reason, that it will not decide the issue of the retroactivity of the Civil Rights Act of 1991 in this case. At a minimum, it should

grant the petition, vacate the judgment of the Eighth Circuit Court of Appeals, and remand the case to that Court with directions to pass upon plaintiff Hicks' argument that the Act applies retroactively to this case. This argument was presented to the Court of Appeals but was not ruled upon by the Court of Appeals. Elementary considerations of fairness and justice dictate that plaintiff Hicks have his day in court on the retroactivity issue. Surely *some* court should address and resolve the merits of his argument that the Civil Rights Act of 1991 applies retroactively to this case. This Court has the authority, in the exercise of its discretion, to order the Court of Appeals to pass upon this argument, even if the argument was not presented to the Court of Appeals in a timely fashion. *Barr v. Matteo*, 355 U.S. 171, 173 (1957). In fact, this Court has routinely remanded cases to the Courts of Appeal for reconsideration in light of intervening legislative developments. *See, e.g., Bureau of Economic Analysis v. Long*, 454 U.S. 934 (1981); *Sioux Tribe v. United States*, 329 U.S. 684, 685 (1946). Accordingly, in the event this Court declines to address and resolve the merits of plaintiff Hicks' retroactivity argument it should order the Court of Appeals to address and resolve the merits of that argument.[1]

---

[1] Without question, the case at bar is still "pending" for purposes of applying new legislation to it inasmuch as the appellate process has not yet been fully exhausted. *See Bradley v. Richmond School Board*, 416 U.S. 696, 711 n.14 (1974).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

John D. Lynn
Michael J. Hoare
MICHAEL J. HOARE, P.C.
314 N. Broadway, Suite 1130
St. Louis, Missouri 63102
(314) 241-7961

Attorneys for Petitioner Hicks

APPENDIX

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

Nos. 85-2769/2817

Kenneth G. Hicks,
Appellee/cross-appellant,

v.

Brown Group, Inc., d/b/a Brown Shoe Company, Inc.,
Appellant/cross-appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

[PUBLISHED]

Filed: October 9, 1991

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

ORDER

On March 18, 1991, the United States Supreme Court vacated the judgment of this court in the present case and remanded the case to this court for further consideration in light of this court's en banc opinion to be filed in *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir.) (*Taggart*), *reh'g en banc granted*, 934 F.2d 1414 (1990). *Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

On June 6, 1991, this court filed its en banc opinion in *Taggart* holding that, after the Supreme Court's decision in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), discriminatory discharge claims are not actionable under 42 U.S.C. § 1981. 935 F.2d 947, 948 (8th Cir. 1991). The mandate in *Taggart* was issued in August 1991.

Pursuant to the directions of the Supreme Court, we have reconsidered our opinion in light of this court's en banc opinion in *Taggart*. Accordingly, we now reverse the judgment of the district court and remand the case to the district court with directions to dismiss the complaint with prejudice.

A true copy.

Attest:

/s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

United States Court of Appeals
For the Eighth Circuit

Nos. 88-2769/2817

Kenneth G. Hicks,
Appellee/Cross-Appellant,

v.

Brown Group, Inc., d/b/a Brown Shoe Company, Inc.,
Appellant/Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri

Filed: December 23, 1991

Before McMILLIAN, Circuit Judge, HEANEY, Senior Circuit Judge, and FAGG, Circuit Judge.

ORDER

Before the court are motions of appellee Kenneth G. Hicks to vacate this court's judgment of October 9, 1991, and to extend the stay of mandate entered on October 31, 1991, and effective through December 30, 1991. For the reasons discussed below, we deny both motions.

In October 1988, the district court entered judgment for Hicks following a jury trial in Hicks' action under 42 U.S.C. § 1981 alleging racially discriminatory termination of employment. On April 16, 1990, this panel affirmed the judgment of the district court. *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990). On March 18, 1991, the Supreme Court vacated the panel's opinion and remanded the case for further consideration in light of this court's then-pending en banc decision in *Taggart v. Jefferson County Child Support Enforcement Unit. Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

On June 6, 1991, this court ruled in *Taggart* that the Supreme Court's decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989), precluded discriminatory discharge claims under 42 U.S.C. § 1981. *Taggart v. Jefferson County Child Support Enforcement Unit*, 935 F.2d 947, 948 (8th Cir. 1991) (en banc). Accordingly, on October 9, 1991, this panel issued an order reversing the district court in *Hicks* and remanding the case with instructions to dismiss Hicks' complaint with prejudice. Hicks sought a stay of the mandate, which was granted until December 30, 1991.

On November 21, 1991, President Bush signed the Civil Rights Act of 1991 into law. Section 101(2)(b) of the Act amends 42 U.S.C. § 1981 to include the following language:

> For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

Civil Rights Act of 1991, § 101(2)(b) (text of S. 1745 as approved by House and Senate Nov. 7, 1991).

In his motion to vacate this court's judgment of October 9, 1991, Hicks argues that this provision of the Act should apply retrospectively to his action against Brown Group, Inc. In view of the Supreme Court's previous remand of this matter, we believe this question requires the consideration of the court en banc with the subsequent opportunity for Supreme Court review.

Hicks has failed, however, to file a timely petition for rehearing with suggestion for rehearing en banc. Because of this failure, the time period during which he may petition the Supreme Court for a writ of certiorari to review this court's judgment will expire on January 7, 1991. *See* Sup. Ct. R. 13.1; 13.4. The delay which en banc consideration of this matter

would entail therefore would foreclose Hicks' access to further review by the Supreme Court.

Under these circumstances, we believe the question of the retrospective effect of the Civil Rights Act of 1991 on this case should be presented to the Supreme Court in a petition for writ of certiorari. Accordingly, appellee Hicks' motions are hereby denied.

A true copy.

Attest:

/s/ Michael E. Gans

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(2)

No. 91-1116

Supreme Court, U.S.
FILED
FEB 5 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH HICKS,
Petitioner,

vs.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS M. HANNA*
SHELLEY M. PULLIAM
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
Telephone: (314) 567-7350

Attorneys for Respondent
* *Counsel of Record*

EUGENE F. JORDAN
Associate General Counsel
Brown Group, Inc.
P. O. Box 29
8400 Maryland Avenue
St. Louis, Missouri 63166
Telephone: (314) 854-4116

St. Louis Law Printing, Inc. 13307 Manchester Rd. St. Louis, MO 63131 314-231-4477

RULE 29.1 LIST

Brown Group, Inc., d/b/a Brown Shoe Company, Inc., has no parent. Brown Group, Inc. holds no controlling interest in any companies which are not wholly-owned subsidiaries.

TABLE OF CONTENTS

	Page
Rule 29.1 List	i
Table of Contents	iii
Table of Authorities	vi
Statement of the Case	1
Summary of Argument	4
Reasons for Denying the Writ	6
I. This Cause Is Not The Proper Vehicle Upon Which To Grant Certiorari To Resolve The Issue Of Whether The Civil Rights Act Of 1991 Applies Retrospectively To Pending Cases	6
A. The Alleged Conflict Is Not The Type Of Conflict Upon Which Certiorari Is Based And Thus, In Accordance With Supreme Court Rule 10, Review By This Court Is Unwarranted	6
B. A Resolution Of This Issue As It Relates To This Factually Unique Case May Not Fully Resolve The Issue In General And Thus, Lacks Sufficient General Importance To Merit Review By This Court	8
C. This Court Should Deny Certiorari On The Issue Of The Retrospectivity Of The Civil Rights Act Of 1991 Inasmuch As Such Issue Is Not Properly Before This Court	11

II. The Petition For Certiorari Should Be Denied Outright Inasmuch As The Civil Rights Act Of 1991 Is Clearly Prospective In Nature 13

A. The Civil Rights Act Of 1991 Is Not To Be Applied Retrospectively 14

1. Sponsors' Interpretative Memorandum 15

2. Section By Section Analysis 16

3. Supreme Court Authority 17

B. The Civil Rights Act Of 1990 and H.R. 1 1991 Provide Further Indicia That The Civil Rights Act Of 1991 Be Applied Prospectively Only 18

1. Civil Rights Act Of 1990 18

2. H.R. 1 1991 19

C. The Specific Wards Cove Exemption Of Section 402(b) Does Not Support An Inference Of General Retrospectivity 19

D. The Extraterritoriality Provision Of Section 109(c) Does Not Support An Inference Of General Retrospectivity 20

E. The EEOC Policy Guidance On Retrospectivity Of The Civil Rights Act Of 1991 Comports With The View That The Amendments Not Be Applied Retrospectively 21

Conclusion 22

Appendix

A. Order of the United States District Court for the Eastern District of Missouri (October 28, 1991)..... A-1

B. Order of the United States Court of Appeals for the Eighth Circuit (October 31, 1991)..... A-2

C. Order of the United States District Court for the Eastern District of Missouri (November 12, 1991)..... A-3

TABLE OF AUTHORITIES

Page(s)

Cases:

Baxter v. Morizavires, 455 U.S. 1006 (1982) 6

Bess v. Bess, 929 F.2d 1332 (8th Cir. 1991) 21

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1984) 15,16,17,18

Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974) 18

Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577 (1982) 14

Brown Group, Inc. v. Hicks, 111 S. Ct. 1299 (1991) 2

Claridge Apartments Co. v. Commissioner, 323 U.S. 141 (1944) 17

Consumer Product Safety Commission v. G.T.E. Sylvania, Inc., 447 U.S. 102 (1980) 13-14

Courtney v. Canyon Television & Appliance Rental, 899 F.2d 845 (9th Cir. 1990) 7

EEOC v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 11

Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976) 16

G.D. Searle & Co. v. Cohn, 455 U.S. 404 (1982) 11

Gonzalez v. Home Insurance Co., 909 F.2d 715 (2d Cir. 1990) 7

Greco v. Orange Memorial Hospital Corp., 423 U.S. 1000 (1975) 6

Green v. United States, 376 U.S. 149 (1964) 17

Hicks v. Brown Group, Inc., 902 F.2d 630 (8th Cir. 1990) 2

High v. Broadway Industries, Inc., No. 90-1066-CV-W-3 (D. Mo. Jan. 7, 1992) 22

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 110 S. Ct. 1570 (1990) 13,15,16,17

Lavender v. V & B Transmission & Auto Repair, 897 F.2d 805 (5th Cir. 1990) 7

McKnight v. General Motors Corp., 908 F.2d 104 (7th Cir. 1990) 7

Miller v. United States, 294 U.S. 435 (1935) 17

NLRB v. Local 103, International Association of Bridge Workers, 434 U.S. 335 (1978) 17

North Haven Board of Education v. Bell, 456 U.S. 512 (1987) 16

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 2,7

Russell v. United States, 464 U.S. 16 (1983) 19

Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1981) 16

Taggart v. Jefferson County Child Support Enforcement Unit, 915 F.2d 396 (8th Cir. 1990), *reh'g en banc*, 935 F.2d 947 (1991) 2

United States v. Magnolia Petroleum Co., 276 U.S. 160 (1928) 17

United States v. Menasche, 348 U.S. 528 (1955) 20-21

United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982) 17

Statutes, Regulations and Rules:

42 U.S.C. § 1981 ..... *passim*

Civil Rights Act of 1991, Pub. L. No. 102-166 ..... *passim*

Immigration and Nationality Act of 1952, 66 Stat. 280 20

Rule 10, Rules of the Supreme Court 4,7,8

Rule 14.1, Rules of the Supreme Court 1

Rule 40, Federal Rules of Appellate Procedure 10,11,12

Miscellaneous:

137 Cong. Rec. S 15478 (daily ed. Oct. 30, 1991)..... 16

137 Cong. Rec. S 15483 (daily ed. Oct. 30, 1991)..... 15

137 Cong. Rec. S 15485 (daily ed. Oct. 30, 1991)..... 15

137 Cong. Rec. S 15953 (daily ed. Nov. 5, 1991) 20

137 Cong. Rec. S 15963 (daily ed. Nov. 5, 1991) 19

137 Cong. Rec. S 15966 (daily ed. Nov. 5, 1991) 20

EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991 (Dec. 27, 1991)..... 21

Harlan, J., *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541 (1958) 8

Statement on Signing the Civil Rights Act of 1991 (Nov. 21, 1991)..... 17

No. 91-1116

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

KENNETH HICKS,

Petitioner,

VS.

BROWN GROUP, INC., d/b/a
BROWN SHOE COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 14.1(g), Petitioner is required to provide "[a] statement of the case containing the facts material to the consideration of the questions presented." (emphasis omitted). Inasmuch as Petitioner failed to provide this Court with a statement including *all* material and procedural facts, Respondent herein is compelled to provide a brief statement of the case.

In 1982, Kenneth Hicks was terminated from his employment by Brown Group, Inc., d/b/a Brown Shoe Company, Inc., Respondent herein. Hicks brought suit under the Civil Rights Act

of 1866, codified at 42 U.S.C. § 1981, alleging that his termination was improperly motivated by his race, white. In 1988, judgment was entered against Respondent based upon the jury's verdict. While the jury awarded Hicks zero in actual damages, it nonetheless awarded Hicks Ten Thousand Dollars ($10,000.00) in punitive damages. In response, the court modified the jury verdict by increasing the verdict through a grant of additur, awarding one dollar ($1.00) in nominal damages.

On appeal, a panel of the Eighth Circuit Court of Appeals affirmed, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990), despite this Court's earlier decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which clearly held that discriminatory discharges, *inter alia*, are not actionable under § 1981. In response, Respondent herein properly and timely filed a Petition for Rehearing *En Banc*, which was denied. Accordingly, Respondent herein properly and timely filed its Petition for a Writ of Certiorari with this Court.

In the interim, a different panel of the Eighth Circuit Court of Appeals criticized *Hicks*, but, albeit reluctantly, followed precedent. *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (8th Cir. 1990). Thereafter, the Eighth Circuit then granted rehearing *en banc* in *Taggart*. In light of the Circuit's impending *en banc* decision in *Taggart*, this Court vacated the judgment in *Hicks* and remanded the cause on writ of certiorari. *See Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).

In June of 1991, the Eighth Circuit issued its *en banc* decision in *Taggart*, holding that discriminatory discharge claims are not actionable under section 1981. 935 F.2d 947, 948 (8th Cir. 1991). Thereafter, a panel of the Eighth Circuit issued an order on October 9, 1991 reversing the judgment in favor of Hicks and remanding the cause to the district court with directions to dismiss the Complaint with prejudice. Hicks neither filed a

petition for rehearing nor petitioned the court for an extension of time in which to do so. On October 22, 1991, Hicks filed a motion to stay the mandate pending an application for certiorari with this Court, and Respondent herein filed its brief in opposition. By order of court dated October 28, 1991 United States Magistrate David D. Noce dismissed the cause with prejudice. At that point, the cause had been adjudicated under the laws that existed prior to the enactment of the Civil Rights Act of 1991. Despite the October 28, 1991 dismissal of the cause, the Eighth Circuit granted Hicks' motion to stay the mandate until December 30, 1991. The court further stated that if a petition for writ of certiorari was filed on or before December 30, the stay would continue.

In response, Hicks filed a motion to vacate Judge Noce's order dismissing the cause, which was subsequently granted on November 12, 1991. Hicks had yet to file his petition for writ of certiorari. Nine days later, on November 21, 1991, the Civil Rights Act of 1991 was enacted, which provided, in part, that discriminatory discharges were actionable under section 1981. Thereafter, Hicks filed a motion to vacate the Eighth Circuit's October 9, 1991 order, which reversed and remanded with directions to dismiss Hicks' cause, as well as a motion to extend the stay of the mandate for eight days, so he might petition this Court for a writ of certiorari. Both motions were denied. On December 30, 1991, the stay of the mandate expired. On January 7, 1992, Hicks filed this Petition for Writ of Certiorari in this Court.

SUMMARY OF ARGUMENT

Petitioner herein is urging this Court to grant his Petition for Writ of Certiorari to the Eighth Circuit Court of Appeals to decide the issue of whether the Civil Rights Act of 1991 is retrospective in nature and thus, applicable to the instant case. Alternatively, Petitioner requests this Court to grant the petition, vacate the Eighth Circuit's prior judgment and remand the cause to the court of appeals with directions to address the same issue.

In response, Respondent herein respectfully submits that this Court, in its discretion, deny the instant petition. A review of the unique procedural posture of this case, as well as all relevant facts and circumstances, indicate clearly that this cause is not the proper vehicle upon which to grant certiorari to resolve the issue of whether the Civil Rights Act of 1991 applies retrospectively.

First, the alleged conflict alluded to by Petitioner is not the type of conflict upon which certiorari is customarily based and thus, in accordance with Supreme Court Rule 10, review by this Court is unwarranted. The conflict upon which Petitioner bases his petition arises among the *district* courts. Inasmuch as this alleged conflict may in fact be resolved subsequently at the appellate level, this 'conflict' is not ripe. It is the duty and function of the appellate courts to resolve such conflicts, and thus, this 'conflict' is properly resolved at the appellate level. In accordance with that view, the type of conflict generally sufficient to warrant review by this Court arises at the appellate level, not at the district court level. In addition, the 'conflict' upon which Petitioner bases his petition arises wholly outside the realm of this particular case, thereby rendering this case an inappropriate candidate for a grant of certiorari herein. Accordingly, in accordance with Supreme Court Rule 10, the instant petition should be denied.

Second, due to the unique factual and procedural posture of this case, any resolution herein will not fully resolve the issue in general and thus, this case is not the proper vehicle upon which to base a grant of certiorari. As set out in more detail below, this case has, in effect, been fully adjudicated as of October 9, 1991 under the laws that existed prior to the effective date of the Civil Rights Act of 1991. In addition, the procedural posture of this case evidences a gross abuse by Petitioner of the judicial system and the federal rules, which afforded Petitioner the present opportunity to seek certiorari herein. Such abuse should not be condoned herein by a grant of certiorari.

Third, this case is an improper vehicle for review inasmuch as the issue of the retrospectivity of the Civil Rights Act of 1991 was not properly or timely presented to the Eighth Circuit Court of Appeals. The issue of the possible application of the Civil Rights Act of 1991 to this case was initially raised in Petitioner's motion to vacate filed on December 23, 1991. This motion, in essence, was a petition for rehearing which was neither timely filed nor in the proper form. Accordingly, since this issue is not properly before this Court, certiorari should be denied.

Moreover, Respondent submits that the instant petition be denied outright inasmuch as the Civil Rights Act of 1991 is clearly prospective in nature, thereby rendering any grant of certiorari unnecessary. Recent decisions of this Court have fashioned a strong presumption against retrospectivity, which is overcome only when Congress expressly declares otherwise. There exist no such explicit declarations in the 1991 Act, and thus, the 1991 Act is clearly prospective in application. Furthermore, legislative intent is clear that the 1991 Act is to be applied only prospectively. Accordingly, this Court should deny this petition in its entirety.

REASONS FOR DENYING THE WRIT

I. This Cause Is Not The Proper Vehicle Upon Which To Grant Certiorari To Resolve The Issue Of Whether The Civil Rights Act Of 1991 Applies Retrospectively To Pending Cases.

Petitioner herein is urging this Court to grant a writ of certiorari in efforts to breathe a second life into this particular cause. Petitioner is seeking to have this Court either decide the issue of retrospectivity of the Civil Rights Act of 1991 or, alternatively, to order the cause remanded for further consideration in light of the Civil Rights Act of 1991. Simply put, Petitioner is seeking to apply the 1991 Act to this cause of action which arose nearly ten years ago and was, in effect, fully adjudicated *before* the passage of the 1991 Act.

Petitioner relies heavily upon the existence of an apparent conflict which has surfaced among district courts in urging this Court to grant the petition. To the contrary, the existence of a direct conflict on a seemingly important issue is *not* dispositive; this Court has, in its discretion, denied certiorari notwithstanding such clear conflict. *See, e.g., Baxter v. Morizavires*, 455 U.S. 1006 (1982); *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975). A review of the unique procedural posture of this case and consideration of all relevant facts and circumstances demonstrates convincingly that this particular cause is not the proper vehicle for the resolution of whether the 1991 Act is to be applied retrospectively or prospectively.

A. The Alleged Conflict Is Not The Type Of Conflict Upon Which Certiorari Is Based And Thus, In Accordance With Supreme Court Rule 10, Review By This Court Is Unwarranted.

When the Eighth Circuit Court of Appeals rendered its order on October 9, 1991 ordering the dismissal of this cause with

prejudice, the order was wholly in accord with this Court's holding in *Patterson*, barring section 1981 suits based upon discriminatory discharges. Moreover, the Eighth Circuit's order was in accord with various circuit courts as well. *See, e.g., Gonzalez v. Home Insurance Co.*, 909 F.2d 715, 722 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *Courtney v. Canyon Television & Appliance Rental*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavender v. V & B Transmission & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990). Clearly, since the decision of the Eighth Circuit rendered herein did not conflict with other courts of appeals, a state court of last resort, or did not otherwise so far depart from the accepted course of judicial proceedings, a grant of certiorari would be improvident herein. *See* S. Ct. R. 10.1(a).

Yet, Petitioner Hicks cites to several *district* court opinions as evidence of an alleged conflict sufficient to warrant a grant of certiorari in this case. Notwithstanding the existence of such alleged conflict among these certain *district* courts, this Court should deny this petition. As explained above, no Rule 10 conflict arose due to the adjudication of *this particular case*. The conflict to which Petitioner Hicks alleges is thus *outside* the realm of this particular case, thereby rendering this case an improper vehicle for review. Simply put, Petitioner Hicks is attempting to 'bootstrap' the conflict so as to make this case *appear* to be a proper vehicle for review. To the contrary, while the district court cases cited by Petitioner Hicks may well be proper candidates for ultimate review on certiorari, this case most certainly is not.

More importantly, this alleged 'conflict' is not yet ripe, inasmuch as further litigation may produce a consensus at the appellate level, or at least, a satisfactory majority. Accordingly, inasmuch as this issue may well be rendered moot by subsequent courts of appeals' rulings, this petition is, in essence, a request for an advisory opinion, which therefore must be denied out-

right. Again, the type of conflict sufficient to warrant review by this Court must arise at the *appellate* level, *not* at the *district court* level. As stated by Justice Harlan:

> Generally speaking, nothing short of a difference of decision between two Courts of Appeals, or between a Court of Appeals and the Court of Claims, whose judgments are reviewable directly by the Supreme Court, will suffice to satisfy the 'conflict' rule. *A conflict of decision between two district courts is not a ground for certiorari, since resolution of such a conflict is a matter resting with the Courts of Appeals.*

Harlan, J., *Manning the Dikes*, 13 RECORD OF N.Y.C. BAR ASS'N 541, 552 (1958) (emphasis added).

Thus, the conflict alleged herein is clearly not one which merits review by this Court. Not only is Petitioner Hicks attempting to bootstrap the conflict to proffer an *appearance* of a meritorious basis for review, he is also attempting to deny the courts of appeals the opportunity to perform that which they were created to do—produce a consensus among their respective district courts. As exemplified throughout the existence of our judicial system, conflicts among district courts are properly resolved by the respective courts of appeals, and not by this Court. Accordingly, inasmuch as this conflict is not yet ripe for review, nor within the scope of Supreme Court Rule 10, this Court, in its exercise of discretion, should deny certiorari herein.

B. A Resolution Of This Issue As It Relates To This Factually Unique Case May Not Fully Resolve The Issue In General And Thus, Lacks Sufficient General Importance To Merit Review By This Court.

Although the issue of the retrospectivity of the Civil Rights Act of 1991 might well be significant in future cases that may be presented properly before this Court, the unusual posture of this

particular case renders it an inappropriate candidate for consideration of this issue. For all practical purposes, this case has been fully and finally adjudicated. This matter, arising nearly ten years ago, has been fully tried before a jury, appealed and affirmed, denied rehearing *en banc*, vacated and remanded by this Court, reversed by the Eighth Circuit on October 9, 1991 with orders to dismiss and, in accordance with such orders, a mandate had, in fact, issued dismissing this case with prejudice — all *prior* to the passage of the Civil Rights Act of 1991. Yet, while Petitioner Hicks wholly failed to file a proper and timely motion for rehearing *en banc* in response to the October 9, 1991 order, just *prior* to the issuance of the mandate he filed a motion to stay the mandate for the express and sole purpose of "application to the Supreme Court for a Writ of Certiorari." This motion, granted *after* the mandate had already issued, provided for a stay up to and including December 30, 1991, which was to continue *provided* Petitioner Hicks filed his petition *within that period.* Yet, Petitioner Hicks filed his petition on January 7, one week *after* the expiration of the stay of the mandate.

While *technically* this case may be deemed "pending" inasmuch as the order issuing the mandate was vacated, for all practical effects and purposes this matter has been fully and finally adjudicated prior to the passage of the Civil Rights Act of 1991. Specifically, the October 9, 1991 order represented the full adjudication of the parties' rights; the ministerial act of the issuance of the mandate itself, which was immediately forthcoming inasmuch as the stay of the mandate had expired, was all that remained. Petitioner Hicks was apparently cognizant of this fact, as represented by his unsuccessful attempt to extend the stay of the mandate, which was set to expire on December 30, 1991. Inasmuch as this case is *not* representative of the type of cases which would, in fact, be otherwise appropriate vehicles for review, a resolution of the issue in this case will not resolve the alleged conflict and thus, certiorari should be denied.

Further indicia of the 'finality' of this cause as of October 9, 1991 is Petitioner Hicks' failure to file timely a petition for rehearing with suggestions for rehearing *en banc* in response to the Eighth Circuit's October 9 adjudication. As evidenced by his failure to so file, there existed no "points of law or fact which in the opinion of the petitioner the Court ha[d] overlooked or misapprehended." Fed. R. App. P. 40(a). Thus, it is clear that Petitioner Hicks' motivation behind his motion to stay the mandate was not, in fact, to petition for certiorari as he so represented — there existed no proper grounds upon which such petition could be based. To the contrary, Petitioner Hicks' motivation behind the motion to stay the mandate was solely to delay the issuance of the mandate in anticipation of the passage of the Civil Rights Act of 1991. Thus, in the event of such passage, Petitioner Hicks could rely upon the Act to revive his cause of action. In fact, Petitioner Hicks concedes as much in his Statement of the Case. He states: "At [the time of the expiration of the period in which to petition for rehearing], the Civil Rights Act of 1991 was not law. . . . Accordingly, plaintiff Hicks was in no position to file a timely petition for rehearing . . . ." Petition for Writ of Certiorari, at 6.

Moreover, this is not the first instance in this case whereupon Petitioner Hicks had awaited in anticipation the passage of intervening legislation. When this cause was previously before this Court on a petition for writ of certiorari, Petitioner herein urged this Court to exercise judicial restraint in interpreting section 1981 based in significant part upon the *speculation* that Congress was soon to pass the Civil Rights Act of 1990. Thus, it is clear that at the time Petitioner Hicks filed his motion to stay the mandate, it was not filed with the intention to file a petition for certiorari, but was filed to bide time for Congress to pass the legislation which would provide his *only* basis for further review. It is only as a result of this abuse of the judicial process that allows Petitioner Hicks, on the basis of a procedural technicality

arising solely from this flagrant abuse, to argue for the ultimate revival of his cause. Such abuse cannot be condoned herein by the grant of certiorari.

As demonstrated by the foregoing, this is not the proper vehicle for this Petition for Writ of Certiorari on this issue. Not only has this case, in effect, been finally adjudicated, but the procedural posture evidences a gross abuse of the judicial system and the federal rules. Such abuse and indifference to notions of judicial economy, to which Petitioner Hicks now conveniently alludes, should not be rewarded. In summary, the resolution of the issue as it relates to the peculiar posture of this case effectively precludes a finding of broad, general importance to merit review by this Court. Accordingly, this Court, in its discretion, should deny this Petition for Writ of Certiorari.

C. This Court Should Deny Certiorari On The Issue Of the Retrospectivity Of The Civil Rights Act Of 1991 Inasmuch As Such Issue Is Not Properly Before This Court.

The issue of the retrospectivity of the Civil Rights Act of 1991 is not properly before this Court inasmuch as it was not properly or timely raised before the Eighth Circuit Court of Appeals. The issue of the possible retrospectivity of the Civil Rights Act of 1991 initially was raised in Petitioner Hicks' motion to vacate filed on December 23, 1991. Such motion is one not contemplated by either the Federal Rules of Appellate Procedure or the local rules of the Eighth Circuit. In essence, the motion was a petition for rehearing which was neither timely nor in the proper form. *See* Fed. R. App. P. 40. Accordingly, this issue was not properly presented to the Court of Appeals and thus, should not now be decided by this Court. *See EEOC v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982).

In response, Petitioner Hicks argues that he was unable to file properly a motion for rehearing because the Civil Rights Act of 1991 had not yet been enacted before the expiration of the filing period. Petitioner Hicks' contention, however, further evidences the inappropriateness of this case for review. As of the expiration date of the period in which to file such petition, Petitioner Hicks had *no proper grounds* upon which to base a petition for rehearing. Hence, it is apparent the rights of the parties had been *fully* and *fairly* adjudicated. Again, only through abuse of process is Petitioner Hicks able to attempt to revive this claim, and, in effect, to have this case, which spanned over ten years, retried in its entirety.

In addition, it is important to note that the fourteen-day limitation contained in Rule 40, Federal Rules of Appellate Procedure, is designed, in part, to promote judicial economy/efficiency, ensure prompt redress, and respect finality of judgments. While Rule 40 permits an enlargement of time by court order, Petitioner Hicks failed to seek such enlargement, despite the immense publicity surrounding the "impending" Civil Rights Act of 1991. Therefore, even assuming *arguendo* that Petitioner Hicks should not be denied certiorari due to his failure to file a properly or timely petition for rehearing, it is certainly relevant that Petitioner Hicks, despite the incumbence upon him to do so in light of the publicity surrounding the imminency of the passage of the Civil Rights Act of 1991, wholly failed to seek an enlargement of time in which to file his petition pursuant to Rule 40. Petitioner Hicks failed to adhere to either the rules or their time limitations. Thus, to allow Petitioner Hicks to now, after the fact, be heard on this issue would render the underlying principles behind Rule 40 meaningless.

In summary, Petitioner Hicks failed to file timely or properly a petition for rehearing in response to the Eighth Circuit's October 9, 1991 order, and, in addition, failed to seek an extension of time in which to do so. Additionally, Petitioner

Hicks' motion to vacate the October 9 order, in which this issue initially was raised, was in essence an improperly and untimely filed petition for rehearing. Accordingly, since this issue was not properly presented to the Eighth Circuit Court of Appeals, it would be improvident to grant certiorari herein.

II. The Petition For Certiorari Should Be Denied Outright Inasmuch As The Civil Rights Act Of 1991 Is Clearly Prospective In Nature.

The Civil Rights Act of 1991 (Pub. L. No. 102-166) was approved by Congress on November 7, 1991, and signed into law by President Bush on November 21, 1991. Section 102(b) of the Act provides for the recovery of compensatory and punitive damages; Section 102(c) establishes a right to jury trial. On the general question of retroactivity, the starting point is Section 402. Section 402 establishes the effective date for the above provisions:

> **Sec. 402. EFFECTIVE DATE.**
>
> (a) In General. Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.
>
> (b) Certain Disparate Impact Cases. Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

The "starting point for interpretation of a statute 'is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.' " *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570, 1575 (1990) (quoting *Consumer*

Product Safety Comm'n v. G.T.E. Sylvania, Inc., 447 U.S. 102, 108 (1980)).

Section 402(a) states that "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The Act is *silent* as to its retrospective application. Accordingly, the inquiry can end here. It is a "familiar canon of statutory construction," *Consumer Product Safety Commission v. G.T.E .Sylvania Corp.*, 447 U.S. 102, 180 (1980), that the plain language of a statute must control its meaning in the absence of "clear evidence" of a "clearly expressed" congressional intent to the contrary. *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 580 (1982). Yet, Petitioner Hicks is urging courts to read 402(a) as if it contained a qualifying clause: "[e]xcept as otherwise specifically provided *in actions specifying that its provisions are prospective*, this Act and the amendments made by this Act shall take effective upon enactment *and shall apply to all cases pending upon or filed after that date.*" Such urging clearly is improper.

Even assuming that section 402's language is not completely dispositive, the legislative history of the Act establishes, beyond a doubt, that the Act is not to be applied retrospectively.

A. The Civil Rights Act Of 1991 Act Is Not To Be Applied Retrospectively.

The Civil Rights Act of 1991 arose in the Senate as S. 1745 and is backed by a wealth of legislative history clearly demonstrating that it was never intended to apply retrospectively. A fair review of the legislative history compels the conclusion that the Act does not apply retrospectively.

1. Sponsors' Interpretative Memorandum.

On October 30, 1991, Senator Danforth, the chief sponsor of the compromise which led to the Act, submitted the Sponsors' Interpretative Memorandum regarding S. 1745. The Interpretative Memorandum was "intended to reflect the intent of all of the original co-sponsors to S. 1745" and was signed by Senator Danforth and six others. Prior to printing the Memorandum, Senator Danforth cited with approval two recent Supreme Court decisions:

> Our intention in drafting the effective date provision was to adhere to the principle followed by the vast majority of Supreme Court cases and exemplified by *Bowen* and Justice Scalia's concurrence in *Bonjorno*.

137 Cong. Rec. S 15483 (daily ed. Oct. 30, 1991).

In explaining what was then denominated as Section 22 (now Section 402), this Interpretative Memorandum provided as follows regarding retrospectivity:

> The Bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and *shall not apply retroactively*.

Id. at S 15485 (emphasis added).

No Senator expressed any direct challenge to this relevant section of the Interpretive Memorandum. In fact, Senator Kennedy, in his response to the introduction of the Interpretive Memorandum, did *not* state that the 1991 Act was to be applied retrospectively. At most, Senator Kennedy merely abdicated the responsibility to the judiciary, without stating his intent. *Id.* While clearly expressing his divergent views on *other* issues raised in the Interpretive Memorandum, he took no clear position on the issue of retrospectivity, despite the clear and unambiguous views expressed in the Interpretive Memorandum.

Accordingly, the view of prospectivity espoused by Senator Danforth is of substantial importance. Indeed, "remarks . . . of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1987). Further, the statements of Senator Danforth are "to be accorded substantial weight," *Federal Energy Adm'n v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976), inasmuch as "it is to the sponsors that we look when the meaning of the statutory words is in doubt." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1981). Clearly, as submitted by Senator Danforth, the Interpretive Memorandum rejects retrospective application of the Civil Rights Act of 1991.

2. Section by Section Analysis.

Shortly before Senator Danforth submitted the Interpretative Memorandum, Senator Dole introduced into the record a Section by Section Analysis representing the views of President Bush, together with fourteen additional Senators. The language contained within this analysis regarding Section 402 is one hundred percent (100%) in accord with that of the Interpretive Memorandum. The analysis submitted by Senator Dole of the effective date provision states as follows:

> Section 22 specifies that the Act and the Amendments made by the Act take effect upon enactment. *Accordingly, they will not apply to cases arising before the effective date of the Act.* [citing *Bowen* and *Bonjorno*]. At the request of the Senators from Alaska, section 22(b) specifically points out that nothing in the Act will apply retroactively to the Wards Cove Packing Company, an Alaska company that spent 24 years defending against a disparate impact challenge.

137 Cong. Rec. S 15478 (daily ed. Oct. 30, 1991) (emphasis added).

Moreover, President Bush, on signing this Act, stressed that the administration would treat this analysis "as authoritative interpretive guidance by all officials in the executive branch with respect to the . . . matters covered in the documents." Statement on Signing the Civil Rights Act of 1991, 27 *Weekly Compilation of Presidential Documents* 1701, 1702 (Nov. 21, 1991). Such presidential statements are indeed relevant in a court's interpretation of a statute. *See, e.g., United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31-32 (1982) (according "great weight" to executive views); *NLRB v. Local 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335, 347 n.9 (1978) (presidential transmittal letter).

3. Supreme Court Authority.

Both the Interpretive Memorandum and the Section By Section Analysis make it quite clear that the Act is to be interpreted from a prospective standpoint in accord with *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S. Ct. 468 (1988), and the concurring opinion of Justice Scalia in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S. Ct. 1570 (1990). *Bowen* clearly held that a new statute should be applied only prospectively unless there exists *specific indication to the contrary*. 109 S. Ct. at 471. In so holding, this Court stated, "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Id.* (citing *Greene v. United States*, 376 U.S. 149, 160 (1964); *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164 (1944); *Miller v. United States*, 294 U.S. 435, 439 (1935); *United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928)).

Thus, the merit of any argument in support of retrospectivity is wholly dependent upon the current viability of the "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."

Bradley v. School Bd. of the City of Richmond, 416 U.S. 696, 711 (1974). At a minimum, the continuing viability of *Bradley* is subject to question inasmuch as it pre-dates this Court's most recent holdings on this issue. Further, in light of Justice Scalia's insightful concurrence in *Bonjorno*, it is more probable than not that *Bradley* is simply no longer 'good law.' Simply put, recent decisions of this Court have fashioned a strong presumption against retrospectivity, overcome only when Congress *expressly* declares otherwise. Since there is no *express l*anguage mandating retrospectivity, the Civil Rights Act of 1991 clearly is prospective in nature.

B. The Civil Rights Act Of 1990 And H.R. 1 1991 Provide Further Indicia That The Civil Rights Act Of 1991 Be Applied Prospectively Only.

Had Congress intended the Act to apply to pending cases, Congress is quite capable of saying so. Twice in recent months Congress proposed amendments to Title VII/Section 1981 which plainly applied retrospectively. The defeat of these amendments, coupled with the legislative history of the Act, amplify the conclusion that the Act does *not* apply retrospectively.

1. Civil Rights Act of 1990.

Markedly different than the Civil Rights Act of 1991, the 1990 Act contained very specific language clearly evidencing Congress' intent that the law apply retrospectively. Section 15 of S. 2104 provided that certain provisions would apply "to all proceedings pending on or commenced after" the date of the particular Supreme Court decision being overturned. Moreover, the section provided for the vacating of orders and the reopening of cases where orders were inconsistent the new legislation. President Bush summarily rejected this legislation. Following the Presidential veto of the Civil Rights Act of 1990, Congress chose *not* to incorporate retrospective language into the 1991

Act. The absence of such language constitutes additional evidence of congressional intent: by consciously failing to inject retrospective language into the Act, it is clear that Congress did not intend the Civil Rights Act of 1991 to be applied retrospectively.

2. H.R. 1 1991.

Even more persuasive is Congress' *deletion* of specific retrospective language in H.R. 1, an earlier House version of the 1991 Act. Section 112 of H.R. 1 contained specific language which provided that the legislation would apply to all proceedings "pending on or commenced after" the date of the decision being overturned by the legislation. Section 112 was ultimately deleted from the bill and replaced with the present Section 402. Where Congress includes certain language in an earlier version of legislation, but deletes it prior to enactment, it is presumed that the former language was not intended. *Russell v. United States*, 464 U.S. 16 (1983). The deletion of Section 112 from H.R. 1 is clear and convincing evidence of Congress' *rejection* of *any* retrospective application of the Civil Rights Act of 1991.

C. The Specific Wards Cove Exemption Of Section 402(b) Does Not Support An Inference Of General Retrospectivity.

Section 402(b) (*Wards Cove* exemption) of the Act does *not* effect the general prospectivity of the Act. Congress has clearly expressed its view that the Act not be applied retrospectively, and has guarded against any implication to the contrary arising from this specific exemption. In fact, legislative history clearly demonstrates that this section was inserted only to correct a technical error. *See* 137 Cong. Rec. S 15963 (daily ed. Nov. 5, 1991). Senator Dole, with the agreement of Senators Murkowski and Stevens, introduced the following clear history into the record:

> *Absolutely no inference is intended or should be drawn from the language of [the Wards Cove exemption]* that the provisions of the Act or the amendments it makes may otherwise apply retroactively to conduct occurring before the date of enactment of this Act. Such *retroactive application of the Act and its amendments is not intended*; on the contrary, the intention of [the *Wards Cove* exemption] is simply to honor a commitment to eliminate every shadow of a doubt as to any possibility of retroactive application to the case involving the Wards Cove Company.

137 Cong. Rec. S 15953 (daily ed. Nov. 5, 1981) ("Legislative History, Technical Corrections") (emphasis added).

Other Senators expressing the same view included Senator Durenberger, *id.* at 15966 ("Some may attempt to argue at a later date that a special exemption creates an inference that the bill, in general, is retroactive. [T]hat is the wrong conclusion to draw from this [exemption]."); and Senator Simpson. *Id.* ("By [exempting Wards Cove], I am in no way implying that all other companies with litigation pending on the date of enactment should be treated retroactively.").

D. The Extraterritoriality Provision Of Section 109(c) Does Not Support An Inference Of General Retrospectivity.

Section 109(c) does not negate the general prospectivity of the Act as expressed in section 402(a). In fact, this Court similarly has rejected such proposition in *United States v. Menasche*, 348 U.S. 528 (1955). In *Menasche*, this Court entertained the issue of whether there was a conflict between two sections of the Immigration and Nationality Act of 1952 (INA), 66 Stat. 280. Specifically, section 405(a) of the INA provided, with language similar to that contained in section 402 of the Civil Rights Act of 1991, that "nothing contained in this Act, unless otherwise

specifically provided therein, shall be construed . . . ." Another section of the INA, section 405(b), provided that "except as otherwise specifically provided in Title III . . . ." This Court, in rejecting the argument that section 405(b) negated the general prospectivity of section 405(a), emphasized that section 405(b) "merely implement[ed] and emphasiz[ed] the operation of its forerunner and "the slight negative implication derived . . . is overcome by the broad sweep of § 405(a) and its direction that prior law applies unless the Act 'otherwise specifically provid[ed].' " *Menasche*, 348 U.S. at 527-28 (emphasis omitted). Similarly, the slight negative implication arising from section 109(c) of the Civil Rights Act of 1991 in no way negates the general prospectivity of the Act as provided by section 402(a).

E. The EEOC Policy Guidance On Retrospectivity Of The Civil Rights Act Of 1991 Comports With The View That The Amendments Not Be Applied Retrospectively.

In terms of the damages provisions in the Civil Rights Act of 1991, the United States Equal Employment Opportunity Commission has concluded it will not seek damages in charges filed prior to the enactment of the Act, or in post-Act charges that challenge pre-Act conduct. The Commission has reasoned that because *Bowen* represents this Court's more recent holding on the issue of retrospectivity, the Commission will follow the dictates of that case with regard to the retrospectivity of the damages provision. Moreover, the Commission has recognized that a strong argument can be made that, even under *Bradley*, "manifest injustice" would occur if the damage provisions were applied to pre-Act conduct and cases pending upon enactment. *See* EEOC Policy Guidance on Retroactivity of Civil Rights Act of 1991, *reprinted in* 1 Daily Labor Report D-1 (Jan. 2, 1992), at n.15 (citing *Bess v. Bess*, 929 F.2d 1332, 1335-36 (8th Cir. 1991)

(retroactive application of damages provision in Electronic Communications Privacy Act of 1986 would result in manifest injustice" since it "could alter the rights of individuals and the expectation of private litigants")); *see also High v. Broadway Industries, Inc.*, No. 90-1066-CV-W-3 (D. Mo. Jan. 7, 1992).

CONCLUSION

For all the foregoing reasons, Respondent herein respectfully submits that the Petition for a Writ of Certiorari be denied in its entirety.

Respectfully submitted,

THOMAS M. HANNA*
SHELLEY M. PULLIAM
McMAHON, BERGER, HANNA,
LINIHAN, CODY & McCARTHY
2730 North Ballas Road
Suite 200
St. Louis, Missouri 63131
Telephone: (314) 567-7350

Attorneys for Respondent
* *Counsel of Record*

EUGENE F. JORDAN
Associate General Counsel
Brown Group, Inc.
P. O. Box 29
8400 Maryland Avenue
St. Louis, Missouri 63166
Telephone: (314) 854-4116

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1392 C (2)

KENNETH G. HICKS,
Plaintiff,

v.

BROWN GROUP, INC., etc.,
Defendant.

ORDER

In accordance with the Order of the United States Court of Appeals for the Eighth Circuit, filed on October 9, 1991,

IT IS HEREBY ORDERED that the complaint filed in this action, now on remand, is dismissed with prejudice.

/s/ David D. Noce
UNITED STATES MAGISTRATE
JUDGE

Signed this 28th day of October, 1991.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2769/2817EMSL

Kenneth G. Hicks,
Appellee,

vs.

Brown Group, Inc., d/b/a
Brown Shoe Company, Inc.,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellee's motion for stay of mandate has been considered by the court and is granted.

The issuance of mandate in this case shall be stayed to and including December 30, 1991. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

October 31, 1991

Order Entered at the Direction of the Court:
/s/ Michael E. Gans
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-1392 C (2)

KENNETH G. HICKS,
Plaintiff,

v.

BROWN GROUP, INC., etc.,
Defendant.

ORDER

Consistent with the Order of the United States Court of Appeals for the Eighth Circuit, filed on October 31, 1991,

IT IS HEREBY ORDERED that the motion of plaintiff to vacate the Order issued by this Court on October 28, 1991, is sustained.

/s/ David D. Noce
UNITED STATES MAGISTRATE
JUDGE

Signed this 12th day of November, 1991.